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No. 678

In the Supreme Court of the United States

OCTOBER TERM, 1930

SMOOT SAND AND GRAVEL CORPORATION, PETITIONER

v.

WASHINGTON AIRPORT, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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PETITION

The Smoot Sand and Gravel Corporation, by its counsel, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit, entered in this cause on October 24, 1930, reversing the judgment of the District Court of the United States for the Eastern District of Virginia.

QUESTION PRESENTED

Whether the boundary line between the Commonwealth of Virginia and the District of Columbia is at high-water mark or low-water mark on the Virginia, or south side, of the Potomac River.

STATEMENT

This suit was instituted by a petition filed in the Circuit Court of Arlington County, Virginia, to enjoin alleged trespasses on property which the respondent claims to own between high and low water mark on the Virginia side of the Potomac River. Because of the interest of the United States in this litigation counsel employed by the United States were associated with counsel for the petitioner in the defense of this suit in the courts below. For the same reason counsel holding official positions in the Department of Justice are now appearing for the petitioner in this proceeding.

The following facts were alleged in the petition:

The respondent is the owner of certain lands in Virginia, including a parcel of land adjacent to the Potomac River, immediately opposite the City of Washington, in the District of Columbia, and extending to low-water mark thereof, and covered and uncovered by the ordinary flow and ebb of the tide. (R. 2–5.) This land, and other lands described in the bill, were purchased by respondent "for the purpose of operating an airport and seaplane base thereon, where airplanes, seaplanes, hydroplanes and other aircraft could land and take off without obstruction," and for the purpose of the development of the real estate along the water front for commercial purposes, etc. (R. 5.) On or about the 19th day of September, 1929, the petitioner wrongfully, and without the consent or knowledge

of the plaintiff, entered upon said tide land and, by means of a dredging boat, or other appliance, proceeded to make excavations thereon, and to fill certain portions thereof by dumping large quantities of gravel, rock, refuse, and other materials, and has so continued to do ever since the date mentioned. (R. 6.) It was alleged that the petitioner's activities would cut off respondent's access to the river and to wharfs, piers, and docks intended to be erected by it, as a result of which the value of the lands would be destroyed and the respondent would be caused to suffer great and irreparable injury, for which it had no adequate remedy at law. (R. 7–8.)

It was prayed that an injunction issue ordering the petitioner to remove its property, machinery, and appliances from the lands of the respondent, and that it, its agents, and servants, be restrained from again entering upon said property, and from placing machinery and appliances thereon, and from dredging, filling, excavating, constructing, or doing any other act upon or about the lands or premises of respondent. (R. 8.)

The petitioner immediately filed a motion to remove the cause to the District Court of the United States for the Eastern District of Virginia upon the grounds of diversity of citizenship. In this motion it alleged "that in the prosecution of such work, petitioner is acting pursuant to the authority of the United States of America, contained in a certain written contract between the petitioner and

the United States of America, dated September 20, 1929." (R. 15.) The cause was duly removed to the United States court. (R. 17.)

The petitioner then filed a motion to dismiss (R. 19) which was sustained by the District Court upon the ground that the property in question was not within the Commonwealth of Virginia, and that, therefore, the United States District Court for the Eastern District of Virginia had no jurisdiction of the action (R. 20–22).

Thereafter the respondent appealed to the United States Circuit Court of Appeals for the Fourth Circuit. (R. 27.) On October 24, 1930, that court entered its decree reversing the District Court, and holding, in effect, that the property in question lying between high and low water mark on the south or Virginia side of the Potomac River was within the limits of the Commonwealth of Virginia, and within the jurisdiction of the United States District Court for the Eastern District of Virginia. (R. 37.)

Following the decision of the Circuit Court of Appeals, and upon the return of the record therein to the United States District Court pursuant to such decision and decree, the District Court on December 12, 1930, allowed the respondent to file a supplemental bill of complaint setting forth that the defendant had, under the work alleged in the original bill, made extensive excavations and fills upon the premises herein involved, and praying

that the petitioner be required to remove the excavations and fills and restore the *status quo*.

SPECIFICATION OF ERRORS

The court erred:

1. In holding that the boundary of the Commonwealth of Virginia extends to and embraces any part of the bed of the Potomac River below high-water mark on the Virginia shore opposite the City of Washington.

2. In holding that the District Court of the United States for the Eastern District of Virginia had jurisdiction of the subject matter of the cause.

3. In holding that by the Seventh Section of the Compact of March 28, 1785, entered into between Commissioners of Maryland and Virginia, the jurisdiction of the Commonwealth of Virginia and the rights of its citizens were settled as extending to low-water mark on the southern shore of the Potomac River.

4. In holding that the Compact of March 28, 1785, ever was or now is in force in the District of Columbia.

5. In holding that the District Court for the Eastern District of Virginia wrongfully dismissed the bill of complaint for lack of jurisdiction.

REASONS FOR GRANTING THE WRIT

1. The question of the location of the boundary between the Commonwealth of Virginia and the District of Columbia has been the subject of con-

tention for many years. The question is of importance to the United States, both in determining the ownership of the real property in question and in settling the question of jurisdiction for police and other purposes along the southern shore of the Potomac River. The United States is interested in many activities in connection with the Potomac River, and particularly in the southern, or Virginia, shore of the river. This suit is of especial interest upon that question for the reason that the petitioner at the time the suit was brought was carrying on the work of construction complained of under a contract entered into with the Secretary of Agriculture, on behalf of the United States, pursuant to the Act of May 23, 1928, c. 719, 45 Stat. 721, entitled "An Act To authorize and direct the survey, construction, and maintenance of a memorial highway to connect Mount Vernon, in the State of Virginia, with the Arlington Memorial Bridge across the Potomac River at Washington."

2. The decision of the Circuit Court of Appeals is in direct conflict with decisions of the Court of Appeals of the District of Columbia in relation to the same matter. In *Evans* v. *United States*, 31 App. D. C. 544, and in *Herald* v. *United States*, 284 Fed. 927, it was held that the boundary line between the District of Columbia and Virginia is at high-water mark on the southern shore of the Potomac River. The same result was reached by

the general term of the Supreme Court of the District of Columbia in *Alexandria Canal Railroad and Bridge Co.* v. *District of Columbia,* 1 Mackey 217.

3. The decision below is also apparently in conflict with the decisions of this Court in *Morris* v. *United States,* 174 U. S. 196, and *Marine Railway Co.* v. *United States,* 257 U. S. 47.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals of the Fourth Circuit should be granted.

THOMAS D. THACHER,
SETH W. RICHARDSON,
G. A. IVERSON,
PAUL W. KEAR,
Attorneys for Smoot Sand and Gravel Corporation.

JANUARY, 1931.

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BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 28) is reported in 44 F. (2d) 343. The opinion of the District Court for the Eastern District of Virginia (R. 20) is not reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 24, 1930. (R. 37.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED, STATEMENT, ETC.

The question presented, the specification of errors relied upon, and a statement of the case will be found in the petition.

ARGUMENT

I

BY THE ORIGINAL GRANT TO LORD BALTIMORE, THE BOUNDARY BETWEEN MARYLAND AND VIRGINIA WAS FIXED AT HIGH-WATER MARK ON THE SOUTH SHORE OF THE POTOMAC RIVER

The question presented in this case is whether land between low-water mark and high-water mark on the south shore of the Potomac River is in the

District of Columbia or the Commonwealth of Virginia. The determination of this question depends upon a consideration of various grants and statutes, together with certain decisions of this Court, which have considered closely related problems.

On June 20, 1632, Charles I granted to Cecilius Calvert, Second Baron of Baltimore and First Lord Proprietary of the Province of Maryland, all the territory of that Province. By the terms of that charter (*infra*, pp. 20–21) it was provided that the western boundary of the grant should run south from what is now Pennsylvania towards the Potomac River "unto the further Bank of said River, and following the same on the West and South, unto a certain Place, called Cinquack, situate near the mouth of said River * * *." On September 27, 1688, King James II granted to Lord Culpeper the territory known as the Northern Neck of Virginia.[1] This grant by its terms included all of the Potomac River.

In *Morris* v. *United States*, 174 U. S. 196, this Court considered the effect of these two grants, and said (p. 225)—

> we agree with the conclusion of the court below, that, upon all the evidence, the charter granted to Lord Baltimore, by Charles I in 1632, of the territory known as the Province

[1] The contention that the boundary line in question was in any way affected by a grant made by the Governor of Virginia to one Howsing in 1669 was disposed of by this Court in *Marine Railway Co.* v. *United States*, 257 U. S. 47, 63.

> of Maryland, embraced the Potomac River and the soil under it, and the islands therein, *to high-water mark on the southern or Virginia shore;* that the territory and title thus granted to Lord Baltimore, his heirs and assigns, were never divested by any valid proceedings prior to the Revolution; nor was such grant affected by the subsequent grant to Lord Culpeper. (Italics ours.)

The conclusion that the charter granted to Lord Baltimore carried the boundary of Maryland to high-water mark on the south bank of the Potomac was reaffirmed by this Court in *Maryland* v. *West Virginia,* 217 U. S. 577. There this Court, after referring to an arbitration before Commissioners appointed by Virginia and Maryland in 1877, said (p. 579):

> They reached the conclusion that following the description in the charter of Charles I to Lord Baltimore, the right or south bank of the Potomac River, at high-water mark, was the boundary between Maryland and Virginia. This conclusion is in accordance with the one reached by this court in the *Morris case,* in which case it was declared that the province of Maryland under the charter of Lord Baltimore embraced the Potomac River to high-water mark on the southern, or Virginia shore, * * *.

In 1776 the State of Virginia adopted a constitution confirming the title of the State of Maryland to the land granted by its charter but reserving "the property of the Virginia shores and

strands, bordering on" the Potomac River. Regardless of the interpretation which should be given to this clause, it is clear that Virginia could not enlarge her boundaries by any statements made in her constitution. Even though Maryland had taken no notice of this constitutional provision or of acts of the Virginia assembly, her silence could not be deemed an acquiescence in the claims they implied. But Maryland did not remain silent, for as soon as Virginia by her constitution of 1776 made an open, public declaration of claims to the Potomac River, Maryland at once solemnly repudiated them. See Proceedings of Convention for October 29 and 30, 1776, in Hanson, Laws of Maryland (1787).

Whether the statement in *Morris* v. *United States, supra,* that the grant of Charles I embraced the Potomac River to its high-water mark on the Virginia shore was necessary to the decision of that case or not, there can be no question as to its correctness. The shore of a river to the line of ordinary high-water mark is part of the river. The grant of a river to a State carries the boundary to the normal high-water mark. *Alabama* v. *Georgia,* 23 Howard 505. This is especially true of a tidal river. A shore, overflowed at high tide, is not susceptible of use except as incident to the use of the stream. The title is held subject to the same public uses as the water itself. *Shively* v. *Bowlby,* 152 U. S. 1.

On the other hand, a boundary at low-water mark is inconsistent with that title and dominion over the river which was granted to Maryland. It is because of this inconsistency that international law has recognized the principle that where the ownership of a river is not divided between bordering States by the thread of the stream, but belongs to one of them alone, the ownership extends to the opposite bank as accessory to the use of the stream. Hall, International Law (7th ed.) 125; 1 Moore, International Law Digest, 617.

II

THE COMPACT OF 1785 BETWEEN MARYLAND AND VIRGINIA DID NOT AFFECT THE LOCATION OF THE BOUNDARY LINE

In 1785 the States of Maryland and Virginia entered into a compact in order to determine certain questions which had been in dispute between them. Article 7 of this compact (*infra*, pp. 21–22) provides that—

> The citizens of each state respectively shall have full property in the shores of Patowmack river adjoining their lands * * *.

The court below held (R. 30) that this compact—

> unquestionably did settle the jurisdiction of that State [Virginia] and the rights of its citizens as extending to low water mark on the river * * *

but this Court has expressly decided that the compact of 1785 had no effect upon the boundary line between the two States. In *Marine Railway Co.*

v. *United States*, 257 U. S. 47, *supra*, this Court said (p. 63):

> The compact between Virginia and Maryland in 1785 also seems to us to have no bearing upon the case. It says nothing about the boundary in terms. Without going into the history of the compact or reciting it, we only need to remark that it was a regulation of commerce, and while with a view to opening up a route to the West it provided in Article 6 that the Potomac should be considered as a common highway for the purposes of navigation and commerce to the citizens of Virginia and Maryland, and in Article 7 gave the citizens of each State full property in the shores of the river adjoining their lands and the privilege of carrying out wharves, &c., with a common right of fishing, it left the question of boundary open to long continued disputes.

The court below in its opinion (R. 35–36) attempted to distinguish the language of this Court set forth above on the ground that the *Marine Railway case* involved the question whether the boundary should be drawn from headland to headland and that consequently the language used could not refer to the question whether the boundary should be established at high-water mark or low-water mark. But we do not believe that this Court's language in the *Marine Railway case* can be so limited. It was an essential part of this Court's decision in that case that the Compact of 1785 need not be considered in determining the boundary of the Dis-

trict of Columbia, and that conclusion is equally applicable in the instant case. See also *Morris* v. *United States,* 174 U. S. 196, 224.

The Compact of 1785, so long as it remained in force, merely accorded to Virginia and her citizens rights and privileges in the nature of easements and servitudes in the shore and stream of the Potomac. The privileges accorded to Virginia amounted to no more than a recognition of the servitude in the stream which is generally allowed in favor of the citizens or subjects of a neighboring sovereign. A cession of such privileges does not negative the retention of territorial sovereignty or ownership, nor does it change boundary lines.

The controversy between Virginia and Maryland as to their boundary continued for nearly a century after the Compact of 1785 (*Morris* v. *United States,* 174 U. S. 196, 224; *Marine Railway Co.* v. *United States,* 257 U. S. 47, 64), and was not settled until the award of the arbitrators named by the two States in 1877 and approved by Congress in 1879. Act of March 3, 1879, c. 196, 20 Stat. 481. Indeed, until the award Virginia claimed the entire river. Thus the two contracting States did not regard the Compact of 1785 as having determined the location of their common boundary.

Furthermore, the Compact of 1785 was never in force in the District of Columbia. By the acts of cession from Maryland and Virginia to the United

States, both States surrendered all their rights of property, as well as their entire sovereignty within the territory ceded, including the whole of the river, its bed and its shores. The Compact was made by the States in their sovereign capacities subject at any time to be modified or abrogated by their joint will. *Georgetown* v. *Alexandria Canal Co.*, 12 Peters 91. The Compact necessarily came to an end, so far as the District of Columbia was concerned, when the two contracting parties were united in one. It follows that: "The compact of 1785 never was in force in the District of Columbia." *Evans* v. *United States*, 31 App. D. C. 544, 550. To the same effect is *Herald* v. *United States*, 284 Fed. 927 (Ct. of App. D. C.).

Nor can it be said that the retrocession of part of the District of Columbia to Virginia operated to revive the Compact of 1785. The easements and privileges possessed by Virginia under the Compact were destroyed by the joint cession to the United States. The Act of Retrocession (Act of July 9, 1846, c. 35, 9 Stat. 35) made no mention of the rights which had been granted by the Compact and the merged easements and privileges were in no way revived. It is well recognized as a principle of common law that when dominant and servient estates are united in the same owner the servitude is extinguished and does not again arise upon severance unless it be reimposed by express words.

Caprow v. *Greenway*, 74 Md. 289, 293; *Denton* v. *Leddell*, 23 N. J. Eq. 64, 66; *Rogers* v. *Powers*, 204 Mass. 257, 264. In *Evans* v. *United States*, 31 App. D. C. 544, *supra*, the court said (p. 552):

> The easements and privileges she possessed in the river, under the compact, were destroyed by the cession to the United States, and, having been lost, they could not be revived by the mere reconveyance of the territory ceded, unless expressly recreated in the act of retrocession.

III

THE DECISION OF THIS COURT IN MARYLAND v. WEST VIRGINIA, 217 U. S. 577, DOES NOT SUPPORT THE DECISION OF THE COURT BELOW

The court below invoked the decision of this Court in *Maryland* v. *West Virginia*, 217 U. S. 577, to support the conclusion that the Compact of 1785 created a new interstate boundary line. The question presented in that case related to the boundary line along the Potomac River between the States of Maryland and West Virginia, the dispute at that stage of the proceeding being, as here, between a line at high-water mark and a line at low-water mark. The Court referred to the arbitration in 1877 between Maryland and Virginia, and stated that although the arbitrators reached the conclusion that the boundary of Maryland, as described in the charter of Charles I, was at high-water mark on the south shore (see p. 10, *supra*), they proceeded (p. 579)—

> to establish the boundary between the States in the light of subsequent events, after referring to the effect of long occupation upon the rights of States and nations, and declaring that the length of time that raises a right by prescription in private parties likewise raises such a presumption in favor of States as well as private parties, * * *.

The court then held that the considerations which had influenced the arbitrators to adopt low-water mark as the boundary between Maryland and Virginia applied with equal force to the line between Maryland and West Virginia. It is clear that this case turned upon prescription. The line at low-water mark was the line which the State of Maryland, by long acquiescence, had estopped herself to question. Of course the award itself did not affect the boundary between the District of Columbia and Virginia. *Marine Railway Co.* v. *United States*, 257 U. S. 47, 64; *Herald* v. *United States*, 284 Fed. 927 (Ct. of App., D. C.).

No claim based upon prescription was alleged in the instant case, nor can any be asserted. From 1791 until 1846 all of the territory now in question was in the District of Columbia. No prescriptive right in favor of Virginia could arise during that period, and since that time the United States has consistently laid claim to jurisdiction over the entire bed of the river. As this Court said in *Marine Railway Co.* v. *United States*, 257 U. S. 47, 65, *supra*—

> the Revised Statutes relating to the District of Columbia, June 22, 1874, § 1, describe the District as "including the river Potomac in its course through the District," which imports an assertion by Congress that the title of the United States embraces the whole river bed; and the jurisdiction of the District over the river seems to have been exercised without dispute. For cases that have reached the reports see *Alexandria Canal Railroad & Bridge Co.* v. *District of Columbia*, 1 Mackey, 217, 225, 226. *Smoot* v. *District of Columbia*, 23 App. D. C. 266. *Evans* v. *United States*, 31 App. D. C. 544.

See also the Act of March 3, 1879, c. 196, 20 Stat. 481, 483, by which the United States, in giving its consent to the award between Virginia and Maryland, provided that nothing contained in the award—

> shall be construed to impair or in any manner affect any right of jurisdiction of the United States in and over the islands and waters which form the subject of the said agreement or award.

It consequently follows that *Maryland* v. *West Virginia, supra*, does not support the decision of the court below. *Herald* v. *United States*, 284 Fed. 927 (Ct. of App. D. C.).

CONCLUSION

We believe that the decision below is erroneous. It is in direct conflict with the decisions of the Court of Appeals of the District of Columbia in

Evans v. *United States*, 31 App. D. C. 544, and *Herald* v. *United States*, 284 Fed. 927. For the reasons set forth in the petition the question presented is one of importance in which the United States is vitally interested. We respectfully submit that the petition should be granted.

Respectfully submitted.

THOMAS D. THACHER,
SETH W. RICHARDSON,
G. A. IVERSON,
PAUL W. KEAR,
Attorneys for Smoot Sand and Gravel Corporation.

JANUARY, 1931.

APPENDIX

The charter granted by King Charles I to Lord Baltimore,[1] dated June 20, 1632, provided in part as follows:

> III. Know Ye therefore, that We, encouraging with our Royal Favour, the pious and noble purpose of the aforesaid Barons of Baltimore, of our special Grace, certain knowledge, and mere Motion, have Given, Granted and Confirmed, and by this our present Charter, for Us our Heirs, and Successors, do Give, Grant and Confirm, unto the aforesaid Caecilius, now Baron of Baltimore, his Heirs, and Assigns, all that Part of the Peninsula, or Chersonese, lying in the Parts of America, between the Ocean on the East and the Bay of Chesapeake on the West, divided from the Residue thereof by a Right Line drawn from the Promontory, or Head-Land, called Watkin's Point, situate upon the Bay aforesaid, near the river Wigloo, on the West, unto the main Ocean on the East; and between that Boundary on the South, unto that Part of the Bay of Delaware on the North, which lieth under the Fortieth Degree of North Latitude from the Equinoctial, where New England is terminated; And all that Tract of Land within the Metes underwritten (that is to say) pass-

[1] The original charter was in Latin. The translation above is found in 3 Thorpe, Charters and Constitutions, 1677, 1678.

ing from the said Bay, called Delaware Bay, in a right Line, by the Degree aforesaid, unto the true meridian of the first Fountain of the River of Pattowmack, thence verging toward the South, unto the further Bank of the said River, and following the same on the West and South, unto a certain Place, called Cinquack, situate near the mouth of the said River, where it disembogues into the aforesaid Bay of Chesapeake, and thence by the shortest Line unto the aforesaid Promontory or Place, called Watkin's Point; so that the whole tract of land, divided by the Line aforesaid, between the main Ocean and Watkin's Point, unto the Promontory called Cape Charles, and every the Appendages thereof, may entirely remain excepted for ever to Us, our Heirs and Successors.

The compact entered into in 1785 between Maryland and Virginia [2] provided in part as follows:

Sixth, The river Patowmack shall be considered as a common highway for the purpose of navigation and commerce to the citizens of Virginia and Maryland; and of the United States, and to all other persons in amity with the said states trading to or from Virginia or Maryland.

Seventh, The citizens of each state respectively shall have full property in the shores of Patowmack river adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river,

[2] The text of the compact may be found in 1 Dorsey, Maryland Laws, 1692–1839, p. 187, and 12 Hening, Virginia Statutes, p. 50.

but the right of fishing in the river shall be common to, and equally enjoyed by the citizens of both states; provided that such common right be not exercised by the citizens of the one state, to the hindrance or disturbance of the fisheries on the shores of the other state, and that the citizens of neither state shall have a right to fish with nets or seans on the shores of the other.

Eighth, All laws and regulations which may be necessary for the preservation of fish, or for the performance of quarantine, in the river Patowmack, or for preserving and keeping open the channel and navigation thereof, or of the river Pocomoke within the limits of Virginia, by preventing the throwing out ballast, or giving any other obstruction thereto, shall be made with the mutual consent and approbation of both states.

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